PETROLIAM NASIONAL BHD (PETRONAS) v. COMPTROLLER OF STATE SALES TAX, SARAWAK & ORS

HIGH COURT SABAH & SARAWAK, KUCHING
AZHAHARI KAMAL RAMLI J
[KCH-13NCvC-8-11-2019]
13 MARCH 2020

ADMINISTRATIVE LAW: *Exercise of judicial functions – Judicial review – Application for – Jurisdictional points raised on declaratory reliefs sought for – Applicant challenged legislative power of State to impose sales tax on petroleum product – Whether court had jurisdiction to grant declarations sought – Whether wrong party named in suit – Whether acts of Comptroller of State Sales Tax irrational, unreasonable or disproportionate*

CONSTITUTIONAL LAW: *Federal and State laws – Constitutionality – Imposition of sales tax on petroleum product – Whether State Legislature of Sarawak empowered to impose sales tax on petroleum product as envisaged by impugned section of the State Sales Tax Ordinance – Whether State Sales Tax (Taxable Goods and Rate of Tax) (Amendment) (No 2) Order 2018 constitutional and valid – Power of State Legislature to enact State Sales Tax Ordinance*

In this judicial review application, the reliefs sought by the applicant were (i) a declaration that (a) the State Sales Tax Ordinance (ss. 7, 8, 11(1), 12(1), (6) and/or (7) and/or 15(d); (b) the State Sales Tax (Taxable Goods and Rate of Tax) (Amendment) (No 2) Order, 2018 Swk LN 239; and (c) regulation 19C, Sarawak State Sales Tax Regulation 1998 Swk LN 80/98 to the extent that it allowed for sales tax to be imposed on petroleum products merely with an issuance of an invoice was *ultra vires* the Federal Constitution and was null and void; (ii) an order of *certiorari* to quash the notices of assessment issued by the first respondent to the applicant; and (iii) an order to stay the execution or implementation of the notices of assessment until the disposal of this judicial review application. Briefly, the applicant sought for a declaration on the constitutionality of the State law and regulations made thereunder and for *certiorari* against the act of the first respondent. The first respondent had notified the applicant that the applicant and its subsidiaries had to comply with the State Sales Tax Ordinance and to register themselves and to submit returns with the first respondent. The applicant was notified that, among others, it is a 'taxable person' undertaking the sale of petroleum product. The first respondent also notified the applicant that it had to submit returns in Form 3 of the State Sales Tax Regulation 1998 and should the applicant fail to submit the return, the first respondent would assess the tax payable under s. 21(1) of the State Sales Tax Ordinance which, if unpaid, would be recovered as a civil debt. At the outset of the hearing of the judicial review, the respondents raised preliminary points on jurisdiction and proposed that the jurisdictional point on the declaratory relief be heard. The issues that arose were (i) in so far as the declaratory relief was concerned,

whether the applicant had failed to bring itself within the timeline provided for in O. 53 r. 3(6) of the Rules of Court 2012; (ii) whether this court did not have the jurisdiction to grant the declaration because the declaration sought by the applicant was in fact challenging the legislative power of the State to pass the State Sales Tax Ordinance and to impose sales tax on petroleum product; (iii) whether the applicant had named the wrong party; (iv) whether the State Legislative of Sarawak is empowered to impose sales tax on petroleum product as envisaged by the impugned section of the State Sales Tax Ordinance; and (iv) whether the acts of the first respondent were irrational, unreasonable or disproportionate. The applicant also raised two preliminary objections with regard to the filing of two affidavits at encls. 34 and 38 by the State Legal Officer of the State Attorney General Chambers on the ground that the State Legal Officer is not empowered to affirm affidavit on behalf of the respondents; and encls. 39 and 40 on the ground that they were filed in bad faith and/or abuse of process. The applicant argued that the Government Proceedings Act 1956 ('GPA') does not empower the State Legal Officer to affirm affidavit on behalf of both the Comptroller, the first respondent and the Sarawak State Government, the second respondent.

Held (ordering accordingly):

(1) In regards to the preliminary objection raised by the applicant, s. 24(1)(b) of the GPA clearly allows a State Legal Officer to represent the Government in any civil proceedings in all level of courts in this country and to have equal standing with any advocates within the meaning of Sarawak Advocate Ordinance (Cap 10) (or Advocates Ordinance (Sabah) (Cap 2) or the Legal Profession Act 1976). By necessary implication, this provision should also be interpreted in such way that it would enable the State Legal Officer to discharge duties in the best interest of the Government. It is trite that a solicitor may affirm an affidavit on behalf of a litigant subject to conditions and such authority should also be extended to the State Legal Officer. Hence, s. 24(1)(b) of the GPA must be interpreted liberally and the phrase 'may make and do all appearances, acts and application in respect of such proceedings on behalf of the Government' must include the authority to affirm an affidavit, subject to conditions. The matter deposed by the deponent was well within her personal knowledge and did not contravene the general restriction under O. 41 r. 5 of the Rules of Court 2012. Hence, this court overruled the preliminary objections raised by the applicant. (paras 8, 9 & 11)

(2) The applicant sought to declare the state ordinance and subsidiary legislation in particular reg. 19C of the Sarawak State Sales Tax Regulations 1998 null and void. As late as 1 July 2019, the applicant had been notified that it classified as a 'taxable' and had to pay State Sales Tax at the rate of 5% of the sale value of the petroleum product.

The applicant had also been notified that it had to submit the return in Form 3 of the State Sales Tax Regulation 1998 and would be assessed for State Sales Tax under s. 21(1) of State Sales Tax Ordinance. However, the first respondent only issued the first notice of assessment on 28 August 2019. The issuance of this notice of assessment had adversely affected the applicant because the applicant was now required to comply with this notice so as to avoid any civil proceedings. The three months' timeline should be computed from 28 August 2019 *ie* the date of the first notice of assessment. Hence, on 25 November 2019, when the application for leave was filed, the applicant was still within the timeline under O. 53 r. 3(6). Thus, the application for judicial review was properly brought before the court. (paras 21-23)

(3) The basis of this judicial review application was founded on the fact that the impugned State law *ie* the State Sales Tax Ordinance had encroached its Legislature boundary by imposing the sales tax on petroleum product that falls under the Federal List. 'Oil (and oilfield)' and 'petroleum products' are listed in Item 8(j) of the Federal List (List I) of Sch 9 of the Federal Constitution. Hence, it was clear that the crux of the declaratory order sought by the applicant went directly to challenge the power of the State Legislature in passing the impugned section of the State Sales Tax Ordinance. This challenge fell under art. 4(3)(b) of the Federal Constitution and pursuant to cl. (4) or art. 4, such challenge must be commenced with the leave of the Judge of the Federal Court. However, the applicant did not obtain such leave before commencing this application. This court had no jurisdiction to grant the declaration sought. (paras 36-38)

(4) The State Sales Tax (Taxable Goods and Rate of Tax) (Amendment) (No 2) Order 2018 and reg. 19C of the Sarawak State Sales Tax Regulations 1998 were made by the Majlis Mesyuarat Kerajaan Negeri ('MMKN'). Hence the MMKN was the decision-maker for the purpose of this relief and was a separate entity from the Government. The State Government was not synonymous with the MMKN hence, the failure of the applicant to name MMKN in this judicial review meant that the correct decision-maker was not before this court. This failure was fatal to the applicant's case and the declaratory orders sought for should be dismissed. (para 39)

(5) The phrase 'and any sale tax imposed by State law in the State of Sabah and Sarawak shall be deemed to be among the matters enumerated in the State List and not in the Federal List' must be interpreted to mean that the imposition of any sales tax itself shall be deemed to be the matter within the power of the state of Sabah and Sarawak under the State List *ie*, List II of the Ninth Schedule of the Federal Constitution. Further, and by way of comparison, art. 74(2) that spells out the legislative power of the State Legislature used the words 'Without prejudice to any power

conferred on it by any other article', which necessarily means that art. 74(2) does not limit the power of the State of Sabah and Sarawak in art. 95B(3). The power of the State of Sabah and Sarawak under art. 95B(3) is independent of the limitation under art. 74(2). The power of the two States to make law imposing sales tax is only subjected to the restriction as provided under paras (a) and (b) of art. 95B(3). In introducing art. 95B(3) Parliament must have acknowledged the restriction on the State legislative power under art. 74(2). The power of the State Legislature of Sabah and Sarawak to make law imposing sales tax is not meant to be confined to the matters enumerated in the State List. This interpretation would bring harmony between those two articles of the Federal Constitution. As such, the State Sales Tax (Taxable Goods and Rate of Tax) (Amendment) (No 2) Order 2018 was constitutional and valid. (paras 55-58)

(6) The power of the State Legislation to enact the State Sales Tax Ordinance comes with the power to make provisions to spell out the mechanics upon which that law may be implemented. This would include the power to define the word 'sale' or stipulating the date when the sales tax is due or when the sale takes place. All this would enable the State to exercise its power within the authority of the law. Hence, the definition of 'sale' under the State Sales Tax Ordinance could be found in s. 2. In the absence of the definition of sale under the Constitution, the extended meaning of the word 'sale' found in s. 2 has the force of law. There was no basis for this court to rule that the definition was unconstitutional. (paras 63-65)

(7) The applicant had from the very beginning took a stand that it was not a taxable person under the State Sales Tax Ordinance and had failed to send the returns for the purpose of computation of the SST by the first respondent. In the circumstances, it was not unreasonable to infer that the first respondent was constrained to make her own judgment on the tax payable, based on the data at her disposal. The first respondent had shown that the amount of tax payable imposed on the applicant was not arbitrary. It was based on reliable data from the port in Bintulu and Miri. Most importantly, the first respondent had made it clear that it would make supplementary assessment under s. 21(6) of State Sales Tax Ordinance. In fact, the applicant had not made any protest on the issuance of the notices. Thus, the claim that the first respondent's act was tainted with irrationality, unreasonableness and illegality was not proven. There was also no *mala fide* on the part of the respondents in issuing the notices. (paras 72 & 73)

(8) There is no express provision in the Petroleum Development Act 1974 ('PDA') that the applicant was exempted from complying with any written law including State law, insofar as the ownership of petroleum in Sarawak. It is not the intention of Parliament to accord the applicant with any special status in relation to its operation in Sarawak. Its ownership on petroleum under s. 2 of the PDA is not without qualification and they are bound by any State law passed by the State Legislature, including the State Sales Tax Ordinance. (paras 78 & 81)

Case(s) referred to:

Ah Thian v. Government of Malaysia [1976] 1 LNS 3 FC ***(refd)***

Associated Provincial Picture Houses Ltd v. Wednesbury Corp [1948] 1 KB 223 ***(refd)***

Basnol Abol & Ors v. The State Government Of Sarawak & Other Appeals [2004] 2 CLJ 553 FC ***(refd)***

Council of Civil Service Unions v. Minister for the Civil Service [1985] AC 374 ***(refd)***

Dato' Menteri Othman Baginda & Anor v. Dato' Ombi Syed Alwi Syed Idrus [1984] 1 CLJ 28; [1984] 1 CLJ (Rep) 98 FC ***(refd)***

Ekuiti Setegap Sdn Bhd v. Plaza 393 Management Corporation [2019] 2 CLJ 592 CA ***(refd)***

Gin Poh Holdings Sdn Bhd v. The Government Of The State Of Penang & Ors [2018] 4 CLJ 1 FC ***(refd)***

Indira Gandhi Mutho v. Pengarah Jabatan Agama Islam Perak & Ors And Other Appeals [2018] 3 CLJ 145 FC ***(refd)***

Lembaga Pembangunan Industri Pembinaan Malaysia v. Konsortium JGC Corporation & Ors (Sued As Incorporated Partnership) [2015] 9 CLJ 273 FC ***(refd)***

Malayan Banking Bhd v. Charterefield Corporation Sdn Bhd [2001] 6 CLJ 407 HC ***(refd)***

Malaysian Trade Union Congress & Ors v. Menteri Tenaga, Air Dan Komunikasi & Anor [2014] 2 CLJ 525 FC ***(refd)***

Penang Development Corporation v. Teo Eng Huat & Anor [1993] 2 CLJ 283 SC ***(refd)***

QSR Brands Bhd v. Suruhanjaya Sekuriti & Anor [2006] 2 CLJ 532 CA ***(refd)***

TR Sandah Tabau & Ors v. Director of Forest, Sarawak & Anor And Other Applications [2019] 10 CLJ 436 FC ***(refd)***

ZI Publications Sdn Bhd & Anor v. Kerajaan Negeri Selangor; Kerajaan Malaysia & Anor (Intervener) [2015] 8 CLJ 621 FC ***(refd)***

Legislation referred to:

Federal Constitution, arts. 4(3)(b), (4), 73(a), 74(2), (4), 95B(3)(a), (b), Eight Schedule Part 1 cl. 12, Ninth Schedule List 1 items 7(h), 8(j)

Government Proceedings Act 1956, s. 24(1)(b)

Petroleum Development Act 1974, ss. 2(1), (2), 4, 6(1)

Rules of Court 2012, O. 41 r. 5, O. 53 r. 3(6)

Rules of the High Court 1980, O. 53

State Sales Tax Ordinance 1998 (Sarawak) (Cap 25), ss. 2, 7, 8, 9, 11(1), 12(1), (6), (7), 13(1), 15(d), 21(1), (6), 24, 62

State Sales Tax Regulations 1998, reg. 19C

For the applicant - Malik Imtiaz & Alvin Chong; M/s Idris, Alvin Chong & Partners Advocs

For the respondents - JC Fong, Talat Mahmood, Abdul Rashid, Saferi Ali, Nur Azhar Bujang & Voon Yan Sin; State Legal Officers, Kuching

Reported by Suhainah Wahiduddin

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JUDGMENT

Azhahari Kamal Ramli J:

Introduction

[1] Pursuant to the State Sales Tax (Taxable Goods and Rate of
B Tax)(Amendment)(No 2) Order 2018, the State Government of Sarawak (the second respondent) imposed sales tax of 5% "for sale or delivery to any person outside the state of Sarawak" on petroleum product specified therein effective from 1 January 2019. Pursuant to the said order, the Comptroller of State Sales Tax, Sarawak (the first respondent) *vide* a notice dated
C 29 August 2019 (the first notice), adjudged and assessed sales tax payable in respect of crude petroleum oil, liquefied natural gas and condensates for the period between 1 January 2019 to 30 June 2019 amounting to RM1,208,100,690.49 and demanded payment thereof within 30 days from the date of the first notice. Subsequently, the first respondent issued another
D notice dated 7 October 2019 (second notice) adjudging and assessing the sales tax payable in respect of crude petroleum oil liquefied natural gas and condensates for the period between 1 July 2019 to 31 August 2019 amounting to RM141,441,205.75 and demanded payment thereof within 30 days from the date of the second notice. Aggrieved with the said decision,
E the applicant now challenged the said decision by way of judicial review.

Preliminary Objection

[2] At the outset of the hearing of the judicial review, learned counsel for the respondents informed the court that the respondents intend to raise preliminary point on jurisdiction and proposed that the jurisdictional point
F on the declaratory relief to be heard first. Learned counsel for the applicant also informed the court that they are raising preliminary objection with regard to the filing of the affidavit by the State Legal Officer and the first respondent. I have indicated that those issues will be heard together with the substantive application and I would deal with them in this judgment. I will
G deal with the preliminary objection by the applicant first.

[3] The applicant raised two preliminary objections with regard to the filing of two affidavits at encls. (34) and (38) by the State Legal Officer of the State Attorney General Chambers on the ground that the State Legal Officer is not empowered to affirm affidavit on behalf of the respondents; and
H encls (39) and (40) on the ground that they were filed in bad faith and/or abuse of process.

[4] Enclosures (34) and (38) were affirmed by Evy Liana binti Atang, a State Legal Officer (the deponent). In her affidavit, the deponent stated that
I she is duly authorised to make the affidavits on behalf of the respondents.

[5] Learned counsel for the applicant argued that the Government Proceedings Act 1956 (GPA) does not empower the State Legal Officer to affirm affidavit and on behalf of both the Comptroller (first respondent) and the Sarawak State Government (second respondent).

[6] Section 24(1)(b) of the GPA provides:

> Appearance of law officer
>
> Notwithstanding any written law:
>
> (a) ...
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> (b) in civil proceedings by or against the Government of a State a law officer, the Parliamentary Draftsman or a Federal Counsel authorised by the Legal Advisor of such State, and in the case of the State of Sabah and Sarawak, the State Attorney General or any legally qualified member of the State Attorney General's Chambers authorized by the State Attorney General for the purpose;
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> may appear as advocate on behalf of such Government and may make and do all appearances, acts and applications in respect of such proceedings on behalf of the Government.

[7] In view of s. 24(1)(b), it is the applicant's stand that the State Legal Officer's authority is limited to appearing as advocate and doing only such act as are necessary for that purpose. In interpreting s. 24(1)(b), learned counsel applied the rule of construction involving "dominant phase" and a "subsidiary phase" and submitted that the phrase "may make and do all appearances, acts and applications in respect of such proceedings on behalf of the Government" is subsidiary to the phase that precedes it ie, "may appear as advocate on behalf of such Government". The minority judgment of David Wong CJSS in the case of *TR Sandah Tabau & Ors v. Director of Forest, Sarawak & Anor And Other Applications* [2019] 10 CLJ 436 was cited to support the applicant's contention that s. 24(1)(b) should not be interpreted to allow a State Legal Officer to affirm an affidavit on behalf of the Government.

[8] Section 24(1)(b) of GPA does not state clearly whether appearance of law officer in a civil proceeding by or against the Government includes the authority to affirm an affidavit. In my opinion, the purposive interpretation should be applied to determine the scope of the authority. Section 24(1)(b) clearly allows a State Legal Officer to represent the Government in any civil proceedings in all level of courts in this country. As such, they should have equal standing with any advocates within the meaning of Sarawak Advocate Ordinance (Cap 10) (or Advocates Ordinance (Sabah)(Cap 2) or the Legal Profession Act 1976). By necessary implication, this provision should also be interpreted in such a way that it would to enable the State Legal Officer to discharge duties in the best interest of the Government.

[9] It is trite that a solicitor may affirm an affidavit on behalf of a litigant subject to conditions (see *Malayan Banking Bhd v. Charterefield Corporation Sdn Bhd* [2001] 6 CLJ 407; [2001] 3 MLJ 160). In my opinion, such authority should also be extended to State Legal Officer. It makes no sense if they are not allowed to affirm an affidavit when a solicitor may do so. Hence, in my judgment, s. 24(1)(b) of the GPA must be interpreted liberally and the phrase "may make and do all appearances, acts and application in respect of such proceedings on behalf of the Government" must include the authority to affirm an affidavit, subject to condition including that he may not affirm on any contentious matter. In the present case, I am of the opinion that the matter deposed to by the deponent are well within her personal knowledge and do not contravene the general restriction under O. 41 r. 5 of the Rules of Court 2012.

[10] With regard to encls. (39) and (40), it was submitted that the affidavits were filed in breach of this court's direction that parties to do all that was necessary by 24 December 2019. Both encls. (39) and (40) were filed on 10 January 2020 and 13 January 2020 respectively. It must be stated here that this order was made on 10 December 2019 during the *ex parte* hearing of the leave application. The respondents were not present.

[11] Having perused the notes of proceedings while I did make an order that parties were to do all things by 24 December 2019, there was no direction to limit the number of affidavit to be filed by the applicant and respondents. Given the serious implication of this application to the parties, it would be unjust if I were to allow this objection and to reject encls. (39) and (40). In the circumstances. I overrule the preliminary objections raised by the applicant.

Jurisdictional Issue 1

[12] It is to be noted that in this judicial review application, the reliefs sought by the applicant are:

(i) declaration that:

(a) the State Sales Tax Ordinance (ss. 7, 8, 11(1), 12(1), (6) and/or (7) and/or 15(d);

(b) the State Sales Tax (Taxable Goods and Rate of Tax) (Amendment) (No. 2) Order, 2018 Swk. L.N 239); and

(c) regulation 19C, Sarawak State Sales Tax Regulation 1998 Swk L.N. 80/98) to the extent that it allows for sales tax to be imposed on petroleum products merely with an issuance of an invoice are *ultra vires* the Federal Constitution and null and void.

(ii) An order of *certiorari* to quash the notices of assessment dated 28 August 2019, 7 October 2019 and 13 November 2019 issued by the first respondent to the applicant.

(iii) An order to stay the execution or implementation of the notices of assessment dated 28 August 2019, 7 October 2019 and 13 November 2019 until the disposal of this judicial review application.

[13] Briefly, the applicant seeks for a declaration on the constitutionality of the State law and Regulations made thereunder and for *certiorari* against the act of the first respondent.

[14] It was submitted by learned counsel for the respondents that in so far as the declaratory relief is concerned, the applicant has failed to bring itself within the timeline provided for in O. 53 r. 3(6) of the Rules of Court 2012 which provides:

> An application for judicial review shall be made promptly and in any event within three months from the date when the ground of application first arose or when the decision is first communicated to the applicant.

[15] In this regard, the impugned State Sales Tax (Taxable Goods and Rate of Tax) Order 2018 was passed by the Majlis Mesyuarat Kerajaan Negeri (referred to as MMKN) on 13 December 2018. By this Orders, petroleum products have been added as taxable goods under the State Sales Tax Ordinance. The Order was gazetted on 14 December 2018. On the same day the State Sales Tax (Amendment) Regulations 1998 made by the MMKN pursuant to s. 62 of the State Sales Tax Ordinance was also gazetted. It must be noted that the impugned reg. 19C, one of the subject matter of this judicial review application was added by this amendment.

[16] It was further submitted that *vide* letter dated 17 December 2018, from the State Financial Secretary Sarawak to the Executive Vice President and group Chief Financial Officer, the applicant was given notification on the scope of the State sales tax on petroleum product effective 1 January 2019.

[17] On 29 May 2019 *vide* letter of the even date, the first respondent notified the applicant that the applicant and its subsidiaries had to comply with the State Sales Tax Ordinance and to register themselves and to submit returns with the first respondent. Subsequently *vide* letter dated 1 July 2019 from the first respondent, the applicant was notified that, among others, it is a "taxable person" undertaking the sale of petroleum product. The first respondent also notified the applicant that it has to submit the return in Form 3 of the State Sales Tax Regulations 1998 and should the applicant fail to submit the return, the first respondent would assess the tax payable under s. 21(1) of the State Sales Tax Ordinance which, if unpaid, will be recovered as a civil debt.

[18] It is interesting to note that *vide* its letter dated 26 July 2019 to the State Attorney General, the applicant had notified that:

> PETRONAS is in disagreement with Sarawak State's view on the applicability of State Sales Tax on petroleum products.

[19] The dates referred to above are pertinent as it relates to the issue of whether the applicant is within the timeline in filing this judicial review application. In this respect, the issue of timeline to institute judicial review application must be tied to the issue of *locus standi*. In the case of *Malaysian Trade Union Congress & Ors v. Menteri Tenaga, Air Dan Komunikasi & Anor* [2014] 2 CLJ 525 the Federal Court took the view that O. 53 of the Rules of the High Court 1980 allows any person who was adversely affected by the decision of any public authority to apply for judicial review. In its decision, the Federal Court cited, with approval, the case of *QSR Brands Bhd v. Suruhanjaya Sekuriti & Anor* [2006] 2 CLJ 532 where the Court of Appeal opined that:

> (16) It is to rid this dichotomous approach which often produce injustice that Order 53 in its present form was introduced. There is a single test of threshold *locus* for all the remedies that are available under the order. It is that the applicant should be adversely affected.

[20] The Federal Court in *Malayan Trade Union Congress* (*supra*) further held that the applicant has to show that he has a real and genuine interest in the subject matter. It is not necessary for the applicant to establish infringement of a private right or the suffering of special damage.

[21] At the risk of repetition, it must be noted that the applicant seeks to declare the State Ordinance and subsidiary legislation in particular reg. 19C of the Sarawak State Sales Tax Regulations 1998 null and void. The undisputed fact of the case shows that as late as 1 July 2019, the applicant had been notified that it was classified as a "taxable" person and has to pay State sales tax at the rate of 5% of the sale value of the petroleum product. Most importantly, the applicant had also been notified that it has to submit the return in Form 3 of the State Sales Tax Regulations 1998 and would be assessed for State sales tax under s. 21(1) of State Sales Tax Ordinance. However, the first respondent only issued the first notice of assessment on 28 August 2019. It is the issuance of this notice that the applicant had been adversely affected by decision made by the first respondent. The passing of the 2018 Order without more would not affect the applicant. Obviously, the issuance of this notice of assessment had adversely affected the applicant because the applicant is now required to comply with this notice so as to avoid any civil proceedings.

[22] In my judgment, the three months' timeline should be computed from 28 August 2019 ie, the date of the first notice of assessment. Hence, on 25 November 2019 when the application for leave was filed, the applicant is still within the timeline under O. 53 r. 3(6).

[23] Based on the above reasons, I am of the opinion that the application for judicial review is properly brought before this court.

Jurisdictional Issue 2

[24] It is submitted by the respondent that this court does not have the jurisdiction to grant the declaration because the declaration sought by the applicant is in fact challenging the legislative power of the State to pass the State Sales Tax Ordinance and to impose sales tax on petroleum product.

[25] In this respect, the respondent brought the court's attention to the relevant paragraphs of the O. 53 statement in support of the judicial review applicant namely:

> 28.1 The State Sales Tax Ordinance did not entitle the Respondents to issue the 2018 order as the subject of the orders, the Petroleum Products, fall within the ambit of the legislative field of "oil" and/or "petroleum products" within the Federal List (List I), 9th Schedule, and Federal Constitution".
>
> 28.2 The State Sales Tax Ordinance only entitles the 2nd Respondents to impose sales tax on matters falling within the State List (List II) and Supplementary List for State of Sabah and Sarawak (List II A).
>
> 28.3 Article 95B(3), Article 112C, Item 7 Part V, 10th Schedule, Federal Constitution are understood as applying only to the Sales tax of such a nature, the power to impose sales tax by the 2nd Respondent being exercisable within those narrow confines. Such power is intended to complement and not to be in competition with wider powers of the Federation to impose taxes.
>
> 28.4 Parliament has exclusive competence over taxation and other matters of "trade, commerce and industry" by virtue of item 7(h) and item 8 in the Federal List."

[26] Referring to the above O. 53 statement, it was suggested by learned counsel for the respondents that the applicant is challenging the competency of the State Legislation Assembly to pass the impugned law.

[27] In response, learned counsel to the applicant submitted that, that is not the case. At p. 9 of the notes of proceedings, learned counsel submitted that:

> We are not saying that Sarawak cannot make State Sales Tax laws because the constitution says they can. The question is, what does that mean? What is committed? As My Lord will see, the question of what the State sales tax as a matter of construction becomes pertinent because of the many duties and taxes that are provided for with respect to Sabah and Sarawak

[28] It is not disputed that in the prayers for the declaration, the constitutionality of the State law and the subsidiary legislation made thereunder have been challenged. Hence it is pertinent to determine the scope of the declaration sought for and whether this court is the competent forum to deal with the matter.

[29] Article 4(3) of the Federal Constitution provides:

> The validity of any law made by Parliament or the Legislative of any State shall not be questioned on the ground that it makes provision with respect to any matter with respect to which Parliament or, as the case may be, the Legislature of the State has no power to make laws, except in the proceedings for a declaration that the law is invalid on that ground or:
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> (a) If the law was made by Parliament, in proceedings between the Federation and one or more States;
>
> (b) If the law was made by the Legislature of a State, in proceedings between the Federation and that state.

[30] Further, art. 4(4) of the Federal Constitution provides:

> (4) Proceedings for a declaration that a law is invalid on the ground mentioned in clause (3) (not being proceedings falling within paragraph (a) or (b) of the clause) shall not be commenced without the leave of a judge of the Federal Court; and the Federation shall be entitled to be a party to any such proceedings, and so shall any State that would or might be a party to proceedings brought for the same purpose under paragraph (a) or (b) of the Clause.

[31] The above provision of the Constitution has been subjected to judicial interpretation as early as in 1976 in the case of *Ah Thian v. Government of Malaysi*a [1976] 1 LNS 3; [1976] 2 MLJ 112, where Suffian LP held at p. 113 (MLJ):

> Under our constitution written law may be invalid on one of these 20 grounds:
>
> (1) In the case of Federal written law, because it relates to a matter with respect to which Parliament has no power to make law, and in the case of State written law, because it relates to a matter with respect to which the State Legislature has no power to make law, article 74; or
>
> (2) In the case of both Federal and State written law, because it is inconsistent with the constitution, see article 4(1); or
>
> (3) In the case of State written law, because it is inconsistent with Federal law, article 75.
>
> The Court has power to declare any Federal or State law invalid on any of the above three grounds.
>
> The Court's power to declare any law invalid on grounds (2) and (3) is not subject to any restrictions and may be exercised by any court in the land and in any proceeding whether it be started by Government or by an individual.
>
> But the power to declare any law invalid on ground (1) is subject to three restrictions prescribed by the Constitution.

First, clause (3) of Article 4 provides that the validity of any law made by Parliament or by State Legislature may not be questioned on the ground that it makes provision with respect to any matter with respect to which the relevant legislature has no power to make law, except in three types of proceedings as follows:

(a) In proceedings for declaration that the law is invalid on that ground; or

(b) If the law was made by Parliament, in proceedings between the Federation and one or more states, or

(c) If the law was made by a State Legislature, in proceedings between the Federation and that state.

...

...

Secondly, clause (4) of article 4 provides that proceedings of the type mentioned in (a) above may not be commenced by an individual without leave of a judge of the Federal Court and the Federation is entitled to be a party to such proceedings and so is any State that would or might be a party to proceedings brought for the same purpose under type (b) or (c) above. This is to ensure that no adverse ruling is made without giving the relevant Government an opportunity to argue to the contrary.

Thirdly, clause (1) of article 128 provides that only the Federal Court has jurisdiction to determine whether a law made by Parliament or by a State Legislature is invalid on the ground that it relates to a matter with respect to which the relevant legislature has no power to make law. This jurisdiction is exclusive to the Federal Court, no other court has it. This is to ensure that a law may be declared invalid on this very serious ground only after full consideration by the highest court in the land.

[32] Guided by the above judgment, the relevant issue to be considered at this juncture is whether the declaratory relief sought by the applicant herein falls within the jurisdiction of this court. In this regard, it is imperative for this court to examine the O. 53 statement filed in support of this application.

[33] In contending that the issuance of the notices of assessment were illegal and *ultra vires* the Federal Constitution, the applicant expressly states that "the State Sales Tax Ordinance did not entitle the respondent to issue the 2018 Order as the subject of that Order, the petroleum product, falls within the ambit of the Legislature fields of "oil" and/or "petroleum Product" within the Federal List (List 1), ninth Schedule, Federal Constitution".

[34] It is further contended that the State Sales Tax Ordinance only entitles the second respondent to impose sales tax on matters falling within the State List (List II) and the supplement to State List for the States of Sabah and Sarawak (List II A).

[35] The applicant argued that Parliament has exclusive competence over taxation and other matters of "Trade commence and industry" by virtue of item 7(h) and item 8 in the Federal List, and would necessarily include competence over into State trade and commerce.

[36] Considering the above statement as pleaded in the O. 53 statement it is clear that the basis of this judicial review application is founded on the fact that the impugned State law ie, the State Sales Tax Ordinance has encroached its legislative perimeter by imposing the sales tax on petroleum product that falls under the Federal List. It is worth mentioning here that "oil (and oilfield)" and "petroleum products" are listed in item 8(j) of the Federal List (List I) of the Ninth Schedule Federal Constitution.

[37] Hence, it is clear that the crux of the declaratory order sought by the applicant goes directly to challenge the power of the State Legislature in passing the impugned section of the State Sales Tax Ordinance. This challenge falls under art. 4(3)(b) of the Federal Constitution and pursuant to cl. (4) of art. 4, such challenge must be commenced with the leave of the judge of the Federal Court. However, the applicant did not obtain such leave before commencing this application.

[38] Consequently, I rule that this court has no jurisdiction to grant the declaration sought for.

[39] Another issue that arises from the above finding is, in so far as the declaratory relief is concerned, whether the applicant has named the correct party. It is not disputed that the State Sales Tax (Taxable Goods and Rate of Tax) (Amendment) (No. 2) Order 2018 and reg. 19C of the Sarawak State Sales Tax Regulations 1998 were made by the Majlis Mesyuarat Kerajaan Negeri (MMKN). Hence the MMKN was the decision-maker for the purpose of this relief. The fact that the MMKN is a separate entity has been decided in the case of *Basnol Abol & Ors v. The State Government Of Sarawak & Other Appeals* [2004] 2 CLJ 553 where it was held, among others, the MMKN is a separate entity from the State Government. The State Government is not synonymous with the MMKN hence, the failure of the applicant to name MMKN in this judicial review means that the correct decision-maker is not before this court. This failure is fatal to the applicant's case and the declaratory orders sought for should be dismissed.

Substantive Application: Declaration

[40] In the event that I am wrong in my finding on the jurisdictional point, I will now deal with the substantive application.

[41] In so far as the State Sales Tax Ordinance is concerned, the applicant contended that the 2018 Order is *ultra vires* the Federal Constitution as the subject matter of the said order ie, petroleum product, falls within the Federal List (List I), Ninth Schedule of the Federal Constitution. The applicant took the view that taxation is a Federal matter under, hence, by

virtue of art. 95B(3) of the Federal Constitution, the competency of the State Legislature to impose sales tax must be limited to the subject matter falling within the State List. Further, it was submitted that the State Legislature is not empowered to enact law having extra-territorial effect as provided under art. 73(a) of the Federal Constitution. The applicant then went at length to discuss the mechanic of the financial scheme of the Federation including the meaning of taxes in item 7(h), Federal List.

[42] Put in the nutshell, the applicant is suggesting that State Legislature of Sarawak is not empowered to make the impugned section of the State Sales Tax Ordinance as it relates to matters listed under the Federal List. In other words, the applicant contended that the impugned provisions of the State Sales Tax Ordinance contravene the condition and restriction imposed by the Federal Constitution and as such are not valid in law in imposing tax other than State sales tax under art. 95B(3).

[43] The main issue to be addressed now is whether the State Legislative of Sarawak is empowered to impose sales tax on petroleum product as envisaged by the impugned section of the State Sales Tax Ordinance. Hence it is pertinent to consider the constitutional provision on the power of the State Legislature.

[44] It is settled that the provisions of the Constitution must be considered as a whole and not in isolation (see *ZI Publications Sdn Bhd & Anor v. Kerajaan Negeri Selangor; Kerajaan Malaysia & Anor (Intervener)* [2015] 8 CLJ 621; [2016] 1 MLJ 153). It must also be construed "generously and not rigidly pedantically (*Dato' Menteri Othman Baginda & Anor v. Dato' Ombi Syed Alwi Syed Idrus* [1984] 1 CLJ 28; [1984] 1 CLJ (Rep) 98; [1981] 1 MLJ 29). The Constitution must be interpreted in the light of its historical and philosophical context as well as its fundamental principles (*Indira Gandhi Mutho v. Pengarah Jabatan Agama Islam Perak & Ors And Other Appeals* [2018] 3 CLJ 145).

[45] It is also said that a liberal approach in construing the Constitution is to give creative and purposive interpretation of the Constitution with insight into social values and with supplement of adaptation to changing needs.

[46] Hence, in the context of Sabah and Sarawak and in particular pertaining to art. 95B(3), the court must not lose sight of the events that took place before the formation of Malaysia on 16 September 1963. The idea of the formation of the new Federation has raised mixed reaction from the people of Sarawak. One such reaction is best illustrated by the speech of Temenggong Oyong Lawai Jau at Long San where he stated that Sarawak was not ready for the plan. He said:

> I see Malaya like a fruit garden, a garden already flourishing, with ripened fruit and ready for eating. Furthermore this garden is fenced round securely, with a fence made of belian. On the other hand what can I say about Sarawak? If Tunku could only see for himself he would see how

> small the garden is, how freshly planted it is, not yet fully mature, not yet firmly established. He would see that it has a fence indeed but only a shaky one, one made of bamboo. ... What happens to the garden when you try to plant trees and shrubs under big trees? They are simple eclipsed by the shadow of big trees ... and never bear fruit. (*Deals, Datus and Dayaks Sarawak and Brunei in the Making of Malaysia* by Michael Leigh, p. 16, publisher: Strategic Information and Research Development Centre)

[47] In view of such reservations among the people of Sarawak, the Cobbold Commission was set up for the purpose of hearing the representation from the representative of the people of Sarawak concerning the formation of Malaysia. An Inter-Governmental Committee was then established to seek the views of the people of Sarawak, North Borneo (now Sabah) and Brunei on this matter. After a series of engagements with the representatives of these States, the committee had issued a very detailed recommendation that form the basis of the formation of Malaysia. In so far as the revenue allocation is concerned, it was recommended that "each Borneo State should have power to impose sales tax, if it wishes, provided that any Federal sales tax would take priority over any State sales tax and provided that any discriminatory rates would not be imposed on goods of the same type but of different origin".

[48] The above recommendation was in fact reflected in the provision of art. 95B(3) of the Constitution which was added by Act 26/1963 which took effect from 16 September 1963. The new art. 95B(3) provides:

> (3) The Legislature of the State of Sabah and Sarawak may also make laws for imposing sales taxes, and any sale tax imposed by state law in the State of Sabah and Sarawak shall be deemed to be among the matters enumerated in the State List and not in the Federal List; but:
>
> (a) there shall not in the charging or administration of State Sales Tax be any discrimination between goods of the same description according to the place in which they originate; and
>
> (b) the charge for any Federal sales tax shall be met out of sums collected from a person liable for that tax before the charge for a State Sales Tax.

[49] In this respect, while admitting that art. 95B(3) allows the State Legislative of Sarawak to make laws for imposing of sales taxes, learned counsel for the applicant submitted that this power is subjected to certain limitation in art. 73(b) provides that:

> 73. In exercising the legislative powers conferred on it by this constitution:
>
> (a) ...
>
> (b) the Legislature of the state may make laws for the whole or any part of that state

Hence, learned counsel for the applicant argued that any State laws do not have any extra-territorial effect.

[50] Secondly, it was argued that in considering the legislative power of the State Legislature, the court should also consider art. 74(4) which provides:

> (4) Where general as well as specific expressions are used in describing any of the matter enumerated in the Lists set out in the Ninth Schedule the generality of the former shall not be taken to be limited by the latter.

[51] The case of *Gin Poh Holdings Sdn Bhd v. The Government Of The State Of Penang & Ors* [2018] 4 CLJ 1 was cited where at pp. 22-25 the Federal Court states:

> [51] The entries in the Legislative Lists are merely legislative fields or heads of an enabling character (*State of Bihar v. Kameshwar* [1952] 1 SCR 889). They give "the outline of the subject matter of legislation" (*Karnataka Bank Ltd v. State of Andhra Pradesh* [2008] 2 SCC 254 and are to be regarded as "*enumeration simplex* of broad categories" (*State of Rajesthan v. Chawla Affidavit in Reply* 1959 SC 544).
>
> [54] However, the wide amplitude to be accorded to the Legislative Lists is not without limit. The rule of widest construction does not extend to matters with no rational connection to the entry.
>
> [55] Neither does the rule of widest construction permit the court to interpret one entry so as to override another entry to render it meaningless. In the event of apparent conflict between entries, the entries should as far as possible to be reconciled by a harmonious construction ...

[52] Based on the above reasons, learned counsel for the applicant suggested that the power of the State Legislature to make law imposing sales tax must be limited in a narrow sense of tax on the retail sale of good only in respect of the sales of subject matter within the State List.

[53] As mentioned earlier, art. 95B(3) was introduced as for the purpose of addressing the concerns of the people of Sarawak prior to the formation of Malaysia, including its financial capabilities, and it formed the constitutional guarantee for the people of Sabah and Sarawak. Hence, the legislative history must be taken into consideration in interpreting this provision.

[54] Article 95B(3) clearly states that the State Legislature is empowered to make law for imposing rules taxes subject to two conditions in para. (i) and (ii) namely:

(i) there shall not in the charging or administration of a State sales tax be any discrimination between goods of the same description according to the place in which they originate and

(ii) the charge for any Federal sales tax shall be met out of sums collected from a person liable for that tax before the charge for a State sales tax.

[55] In my opinion, the phrase "and any sale tax imposed by State law in the State of Sabah or Sarawak shall be deemed to be among the matters enumerated in the State List and not in the Federal List", in art. 95B(3) must

be interpreted to mean that the imposition of any sales tax itself shall be deemed to be the matter within the power of the state of Sabah and Sarawak under the State List ie, List II of the Ninth Schedule of the Federal Constitution.

[56] Further, and by way of comparison, art. 74(2) that spells out the legislative power of the State Legislature used the words "without prejudice to any power conferred on it by any other article" which necessarily means that art. 74(2) does not limit the power of the States of Sabah and Sarawak in art. 95B(3).

[57] Hence, in my opinion, the power of the State of Sabah and Sarawak under art. 95B(3) is independent of the limitation under art. 74(2). The power of the two States to make law imposing sales tax is only subjected to the restriction as provided under paras. (a) and (b) of art. 95B(3). This interpretation is consistent with historical background leading to the introduction of art. 95B(3) on 16 September 1963. As recommended by the IGC report and in introducing art. 95B(3) Parliament must have acknowledged the restriction on the state legislative power under art. 74(2). The power of the State Legislature of Sabah and Sarawak to make law imposing sales tax is not meant to be confined to the matters enumerated in the State List. This interpretation would bring harmony between those two articles of the Federal Constitution.

[58] As such, the State Sales Tax (Taxable Goods and Rate of Tax) (Amendment) (No. 2) Order 2018 is constitutional and valid.

[59] The applicant also seeks for a declaration that ss. 2, 7, 8, 11(1), 12(1), (6) and/or (7) and/or 15(d), State Sales Tax Ordinance 1998 (Chapter 25) are *ultra vires* the Federal Constitution and null and void.

[60] It is the applicant's case that the definition of sale under the impugned section of the State Sales Tax Ordinance must have three elements namely:

(i) there must be an agreement between the parties for the purpose of transferring title to the goods;

(ii) it must be supported by money consideration; and

(iii) as a result of the transaction, property must actually pass in the goods.

[61] It was further argued that the definition of sale must have the elements of the sale of goods under the Sale of Goods Act 1957. Hence, it was contended by the applicant that the definition of sale in the State Sales Tax Ordinance unconstitutional.

[62] As submitted by learned counsel for the respondent, the definition of the word "sale" is not provided for under the Federal Constitution. However, since art. 95B(3) has empowered the State Legislature to pass law imposing the sales tax, regard must also be had to cl. 12, Part I of the Eighth Schedule of the Federal Constitution which stipulates that:

12. No tax or rate shall be levied by or for the purpose of the State except by or under the authority of law.

[63] In my opinion, the power of the State Legislature to enact the State Sales Tax Ordinance comes with the power to make provisions to spell out the mechanism upon which that law may be implemented. This would include the power to define the word "sale" or stipulating the date when the sales tax is due or when the sale takes place. All this would enable the State to exercise its power within the authority of the law.

[64] Hence, the definition of "sale" under the State Sales Tax Ordinance can be found in s. 2 which provides:

"sale" means the sale and disposal of taxable goods and the supply of taxable services, and in relation to goods, includes:

(a) the disposal of taxable good with the right of purchase or on terms providing that the seller retains interest in such taxable goods;

(b) the delivery of taxable goods under any condition as to future payment;

(c) the export of taxable goods for sale or delivery to any person outside the state except for the personal use of the person exporting the same;

(d) the distribution, selling or supply of any taxable goods imported or conveyed into the state for re-sale, retail or re-distribution; and

(e) transactions, in whatever form, involving betting, sweepstake, lotteries or gaining

and "to sell" has a corresponding meaning.

[65] From the above definition, "sale" under the State Sales Tax Ordinance means the sale and disposal of taxable goods including the matters provided for in paras. (a) – (e). In the absence of the definition of sale under the Constitution, the extended meaning of the word "sale" (see *Lembaga Pembangunan Industri Pembinaan Malaysia v. Konsortium JGC Corporation & Ors (Sued As Incorporated Partnership)* [2015] 9 CLJ 273 at p. 291) found in s. 2 has the force of law. There is no basis for this court to rule that the definition is unconstitutional.

Substantive Application: *Certiorari*

[66] I will now deal with the applicant's application for an order of *certiorari*.

[67] Learned counsel for the applicant had summarised the ground of challenge of the first respondent's decision as follows:

(i) the applicant is not a taxable person as it does not carry out any activities within Sarawak of the nature that would allow for sales tax to be imposed under the SSTO read together with the 2018 Order and Sarawak State Sales Tax Regulation. The applicant contends that the notices of assessment are *ultra vires* the State Sales Tax Ordinance.

(ii) the first respondent has no legal basis to issue the notices of assessment as the 2018 Order is not valid in law.

(iii) the material provisions of the State Sales Tax Ordinance relevant to the issuance of the notices of assessment are unconstitutional for allowing the imposition of sales tax on transaction that are not 'sales' in law.

(iv) the first respondent did not have any proper factual basis for the assessment underlying the said notices with the consequence that the first respondent had acted illegally, irrationally and/or unreasonably. Further, the notices were excessive and disproportionate.

(v) the issuance of the notices of assessment contravened the applicant's legitimate expectation.

(vi) the first respondent had issued the notices of assessment in bad faith.

[68] Learned counsel for the applicant submitted at length in his attempt to prove the above issues. A string of cases including *Associated Provincial Picture Houses Ltd v. Wednesbury Corp* [1948] 1 KB 223, *Council of Civil Service Unions v. Minister for the Civil Service* [1985] AC 374, *Lembaga Pembangunan Industri Pembinaan Malaysia v. Konsortium JGC Corporation & Ors (Sued As Incorporated Partnership)* [2015] 9 CLJ 273; [2015] 6 MLJ 612 and *Ekuiti Setegap Sdn Bhd v. Plaza 393 Management Corporation* [2019] 2 CLJ 592; [2018] 4 MLJ 284 were cited to support his submission.

[69] Since I have ruled that the State Sales Tax Ordinance is constitutional, I will only examine the act of the first respondent in issuing the notices of assessment to the applicant and to determine whether there is any basis for judicial review. It must be noted that as at 28 August 2019 when the first notice was issued, there is no challenge on the legality of the State Sales Tax Ordinance and the 2018 Order. As on that date, the said 2018 Order, upon which the notice was issued, shall be presumed valid unless otherwise ordered by the court (see *Penang Development Corporation v. Teo Eng Huat & Anor* [1993] 2 CLJ 283; [1993] 2 MLJ 97).

[70] In the circumstances, the notices issued by the first respondent are made under a valid State law. What remains to be determined now is whether the acts of the first respondent are irrational, unreasonable or disproportionate.

[71] From the affidavit in opposition (II) affirmed by Hajah Elean binti Masa'at on 10 January 2020 filed in this application, the following facts have been established:

(i) the Executive Vice President and Group Financial Officer of the applicant had requested that the notices of assessment be sent to him and he would accept them on behalf of all companies within the applicant's group (affidavit in opposition encl. 39).

(ii) the applicant considered itself not a taxable person under s. 9 of the SSTO and did not want to submit any return to the first respondent.

(iii) the notices of assessment were issued on the basis that the applicant by itself and/or through its subsidiaries were involved in the sale of petroleum products in Sarawak.

(iv) petroleum products listed in the notices of assessment were declared to be "taxable goods" in the 2018 Order made pursuant to the powers conferred on the MMKN by s. 13(1) which was gazetted on 14 December 2018 and came into force on 1 January 2019.

(v) the first respondent made the computation of the SST in the notices of assessment to the best of her judgment since there was no return made to her by the applicant as required by s. 24 of the SSTO.

(vi) the applicant had shipped liquefied natural gas (LNG) and condensates through Bintulu Port. Crude oil and condensates were shipped out of Miri Port from Miri Crude Oil Terminal.

(vii) official data were obtained from Bintulu Port and Miri Port on the volume of the respective type of petroleum products shipped out of the respective ports.

(viii) the computation of the sales tax was made based on the market prices for petroleum according to "trend of the price of sport; LNG and Data Brent Daily Price" on f.o.b. value of the petroleum sold.

(ix) as stated in the notices of assessment, the first respondent reserved the right to make supplementary assessment under s. 21(6) should she have further information relating to the volume of the petroleum sold or the market price or sale value should be higher or lower that the data used to make the computation.

(x) based on the annual report of the applicant for year 2018, the applicant and its agents were involved in the sale of oil and gas products and export thereof. The shipment of petroleum products from Sarawak takes place at Bintulu Port and Miri Port within Sarawak. The title to the petroleum and the risks over the same takes place when the petroleum products are loaded onto the vessel at the said ports and that is when the sale thereof takes place.

(xi) since 2018 Order came into force, eight companies had registered as taxable person involved in the sales of petroleum products declared as taxable goods and six of the companies have been paying State Sales Tax Ordinance.

[72] The above evidence shows that the applicant had from the very beginning took a stand that it is not a taxable person under the State Sales Tax Ordinance and had failed to send the return for the purpose of computation of the SST by the first respondent. In the circumstances, it is

not unreasonable to infer that the first respondent is constrained to make her own judgment on the tax payable, based on the data at her disposal. In my opinion, the first respondent had shown that the amount of tax payable imposed on the applicant is not arbitrary. It was based on reliable data from the port in Bintulu and Miri. Most importantly, the first respondent had made it clear that it would make supplementary assessment under s. 21(6) of State Sales Tax Ordinance. In fact, the applicant had not made any protest on the issuance of the notices.

[73] In the circumstances, the allegation that the first respondent's Act was tainted with irrationality, unreasonableness and illegality is not proven. Further, there is also no *mala fide* on the part of the respondents in issuing the notices.

[74] I will now deal with the issue of legitimate expectation and special status of Petronas. It is the applicant's case that the issue of legitimate expectation and its special status derive from the introduction of the Petroleum Development Act 1974 (PDA) and the vesting instrument executed by the Sarawak State Government pursuant to s. 2(2) of the PDA and the Cash Payment Agreement 1975 between the Federal Government and the State Government.

[75] In essence, the applicant contended that under s. 2(1) of PDA, the entire ownership in, and the exclusive rights, powers liberties and privileges of exploring, exploiting, winning and obtaining petroleum, onshore and offshore of Malaysia shall be vested in them. In return, s. 4 of PDA provides that the applicant makes cash payment to the State Government as may be agreed by the parties concerned. It was and submitted that from 1975 to 2018, when the State Sales Tax Ordinance came into effect, the Sarawak State Government did not impose any sales tax on the petroleum product. Hence, by conduct, the Sarawak Government had represented that no such tax would be payable. This gives rise to an implied representation which is recognised by law as being a basis for legitimate expectation.

[76] In response, learned counsel for the respondents argued that the PDA is an expropriation or compulsory acquisition of petroleum by Parliament without provision for adequate compensation. Further, it is also argued that the vesting instrument does not provide for any consideration for the "grant in perpetuity and conveyance and vesting" of ownership of the petroleum onshore and offshore of Sarawak to the applicant. Based on the aforesaid reasons, the respondent submitted that the "vesting instrument has no constitutional nor statutory authority making it ineffective, null and void and it should not be a valid ground to claim that the applicant is exempted from the 2018 Order and from paying the sales tax.

[77] I am not prepared to rule on that validity of the vesting instrument at this proceeding because it is not the subject matter of the JR application. Nevertheless, the position taken by the applicant on this issue is based on the

premise that by virtue of the PDA, the entire ownership in and the exclusive rights, powers liberties and privileges of exploring, exploiting, winning and obtaining petroleum, onshore and offshore of Malaysia shall be vested in them. Impliedly, it was the contention that their rights under s. 2(1) is absolute and since no sales tax was ever imposed on them prior to 2018, they are entitled to expect that no such tax would be legally imposed on them.

[78] However, insofar as the ownership of petroleum in Sarawak is concerned, there is no express provision in the PDA that the applicant is exempted from complying with any written law including State law.

[79] As pointed out by learned counsel for the respondent, unlike s. 2 of PDA (ie ownership), s. 6 of PDA (ie, for downstream operation) employed the word "notwithstanding the provision of any other written law", thus implying that the applicant's right under the PDA is absolute. For completeness, s. 6(1) reads:

> 6(1) Notwithstanding the provision of any other written law, no business of processing or refining of petroleum or manufacturing of petro-chemical product from petroleum, may be carried out by any person other than PETRONAS unless there is in respect of any such business a permission given by the Prime Minister

[80] There is no such words appear in s. 2(1) which reads:

> 2(1) The entire ownership in, and the exclusive rights, powers, liberties and privileges of exploring, exploiting, winning and obtaining petroleum whether onshore or offshore of Malaysia shall be vested in a corporation to be incorporated under the Companies Act 1965 or under any law relating to incorporation of companies.

[81] In my opinion, while s. 6(1) gives the Prime Minister an absolute right in determining the downstream activities of the applicant, the same cannot be said with regards to the ownership etc, of petroleum under s. 2(1). Hence, it is my finding that it is not the intention of the Parliament to accord the applicant with any special status in relation to its operation in Sarawak. Its ownership on petroleum under s. 2 of PDA is not without qualification and they are bound by any State law passed by the States Legislature, including the State Sales Tax Ordinance. As such, the applicant's contention must fail.

Conclusion

[82] Based on the above reasons, I dismiss the application with costs of RM50,000 subject to payment of allocator fee.